

LETITIA JAMES
ATTORNEY GENERAL


Hon. Philip M. Halpern
United States District Court
Southern District of New York
300 Quarropas Street
White Plains, NY 10601

Based on the representations made herein, Plaintiff's request for sanctions is not supported by fact or law, and is therefore denied. Further, Plaintiff's cross-motion for summary judgment is denied without prejudice to renewal because (1) Plaintiff filed such motion without first seeking the Court's leave; and (2) it is premature at this stage. Plaintiff, should he seek to cross-move for summary judgment, must comply with the Court's Individual Practices Rule 4.E.

Defendants' counsel is directed to serve a copy of this Order on Plaintiff and to file proof of service on the docket.

The Clerk of the Court is respectfully directed to terminate the motion sequence pending at Doc. 108 and Doc. 109.

SO ORDERED.


Philip M. Halpern
United States District Judge

Dated: White Plains, New York
March 9, 2022

Re: *Thurmond v. Avion Thomas-Walsh et al.*, 7:18-cv-00409 (PMH-JCM)

Dear Honorable J. Halpern:

In this 42 U.S.C. § 1983 action, this Office represents Defendants Avion Thomas-Walsh P.A. and Dr. Frederick Bernstein. The remaining claim in this action is plaintiff's First Amendment claim against Def. Thomas-Walsh alleging a retaliatory change in his medication on May 29, 2014 in reponse to a grievance and a supervisory claim against Def. Bernstein based on Def. Walsh's alleged retaliatory act. Defendants submit this letter opposing Plaintiff's motion for sanctions because (1) it is disingenuous and made a bad faith and (2) there is not a legal basis for sanctions based on the mailing of an order, particularly nearly two months before Plaintiff's response is due.

On 2/1/2022, Defendants uploaded a pre motion letter and R. 56.1 statement to the docket. (ECF No. 104). On 2/2/2022, staff mailed Defendants' pre motion letter and 56.1 statement to Plaintiff. (see below, email confirmation). On 2/16/2022, this Court issued a order granting Defendants request for leave to file for summary judgment. (ECF No. 106). Per the order, Plaintiff's opposition is due 4/18/2022. The order was mailed on 2/23/2022 by support staff in the Attorney General's office and notarized by AAG Scolavino (see attached).

1. Defendants' ask the Court to deny Plaintiff's disingenous and bad faith motion for sanctions.

Per the Court order, there was not a date for mailing of the Order of the summary judgment schedule. Plaintiff's claim that he is somehow disadvantaged and says he could have used the

seven days to prepare a cross motion. Defendants view this as odd because cross-motions are normally filed after or at the same time as the initial movant's motion, not before. *See Pouncy v. Advanced Focus, LLC*, 763 F. App'x 134, 135 (2d Cir. 2019) (summary order); *Lyons v. Lancer Ins. Co.*, 681 F.3d 50, 56 (2d Cir. 2012)) (Parties may cross-move for summary judgment. Basically, this means that when one party moves for summary judgment, the opposing party can separately move to have summary judgment entered in its favor on the same or different issues. When the parties cross-move for summary judgment, the court considers each motion independently).

Yet despite this complaint, Plaintiff has already filed a cross-motion for summary judgment and Defendants have not yet filed the initial motion. Plaintiff also quickly filed without filing a pre motion letter or obtaining permission from the Court. Also, Plaintiff received Defendants' pre-motion letter and 56.1 statement well before the Court issued an order granting summary judgment and a schedule as it was mailed on 2/2/2022 (see attached), which is most likely what Plaintiff relied on to file a pre-mature cross-motion well before Defendant's motion for summary judgment.

In addition, although Plaintiff does not appreciate the sheer volume of cases in our office or the size of our office, or staffing issues in the office, the fact remains that matters are handled based on deadlines and priority of work (a motion or deposition over a letter or scanning). Without having to provide attorney work schedules, schedule of court hearings in state and federal court or the amount of support staff in our office, there was nothing wrong in mailing the order on 2/23 well in advance of Defendants moving documents and Plaintiff's response due date.

2. There is not a legal basis for sanctions.

Plaintiff does not cite to a legal reason for sanctions as there is not a legal basis for sanctions based on the allegation that the undersigned mailed a summary judgment schedule on 2/23/2022. *See* 28 USC 28 U.S.C. § 1927 (Section 1927) (sanctions for unreasonable and vexatious conduct that results in excessive litigation costs, here plaintiff claims poverty) or under the Federal Rules of Civil Procedure (FRCP) 11(c) (sanctions for frivolous pleadings, motions, and other papers – here the Court order is not frivolous); FRCP 26(g)(3) (sanctions relating to incomplete or incorrect initial or pretrial disclosures, or improper discovery requests, responses, or objections,); and FRCP 37 (sanctions for the failure to make required disclosures or cooperate in discovery because here we are post discovery).

In conclusion, there is not a legal or factual basis for sanctions and Defendants request that Plaintiff's motion be denied. A copy of the order and cited documents are enclosed below:

Powers, Janice

From: Powers, Janice
Sent: Wednesday, February 2, 2022 11:00 AM
To: Antash, Jennifer
Subject: mail to thurmond (letter and 56.1 stmt)
Attachments: thurmond - frcp 56.1 STATEMENT.pdf; thurmond - pre motion letter sjm - final.pdf

Mail to"
Kevin Thurmond
DIN: 00-A-5247
Woodbourne Correction Facility
99 Prison Road
P.O. Box 1000
Woodbourne, NY 12788

Janice Powers, Esq. (*she/her*)
Assistant Attorney General
New York State Office of the Attorney General
Westchester Regional Office
44 South Broadway – 5th Floor
White Plains, NY 10601

Powers, Janice

From: Antash, Jennifer
Sent: Wednesday, February 2, 2022 11:24 AM
To: Powers, Janice
Subject: RE: mail to thurmond (letter and 56.1 stmt)

This is in the mail

From: Powers, Janice <Janice.Powers@ag.ny.gov>
Sent: Wednesday, February 2, 2022 11:00 AM
To: Antash, Jennifer <Jennifer.Antash@ag.ny.gov>
Subject: mail to thurmond (letter and 56.1 stmt)

Mail to"
Kevin Thurmond
DIN: 00-A-5247
Woodbourne Correction Facility
99 Prison Road
P.O. Box 1000
Woodbourne, NY 12788

Janice Powers, Esq. (*she/her*)
Assistant Attorney General
New York State Office of the Attorney General
Westchester Regional Office
44 South Broadway – 5th Floor
White Plains, NY 10601

Defendants' request for leave to move for summary judgment is granted. In light of Plaintiff's *pro se* status, the Court's pre-motion conference requirement is hereby waived.

Defendants shall serve and file their notice of motion and opening brief by March 18, 2022; Plaintiff shall file his opposition brief by April 18, 2022; Defendants shall serve and file their reply brief by May 2, 2022.

Defendants are directed to serve a copy of this Order on Plaintiff and to file proof of service on the docket.

All The Clerk of the Court is respectfully directed to terminate the motion sequence pending at Doc. 104.

SO ORDERED.

Philip M. Halpern
United States District Judge

Dated: White Plains, New York
February 16, 2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
KEVIN THURMOND,

Plaintiff,

- against -

AFFIDAVIT OF SERVICE

THOMAS-WALSH AND BERNSTEIN,

18-CV-409 (PMH)

Defendants.
-----X

Jacqueline Riley, being duly sworn, says:

I am over eighteen years of age and an employee in the office of the
Attorney General of the State of New York, attorney for defendants herein.

On the 7th day of March 2022, I mailed Court Order 3/7/2022 enclosed in a
sealed, postpaid wrapper, in a depository under the exclusive care and custody of the
United States Postal Service, directed to the said plaintiff pro se at the address within the
State respectively theretofore designated by said plaintiff pro se for that purpose as
follows:

Kevin Thurmond, DIN # 00-A-5247
Plaintiff pro se
Woodbourne Correction Facility
99 Prison Road
P.O. Box 1000
Woodbourne, NY 12788

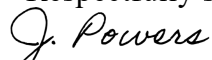

Jacqueline Riley

Sworn to before me this

7th day of March 2022.


JOSEPH SCOLAVINO
Assistant Attorney General

Respectfully submitted,



Janice Powers, Esq.

Assistant Attorney General

cc: Kevin Thurmond (00-A-5247) Woodbourne Correction Facility 99 Prison Road P.O. Box
1000 Woodbourne, NY 12788